Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1976

No. 77-7

JO C. DEAL, EXECUTRIX OF THE ESTATE OF PHILIP L. DEAL, DECEASED; MILDRED C. LETSCH, ADMINISTRATRIX OF THE ESTATE OF DONNA COLLEEN LETSCH, DECEASED; GENE W. BOWERMAN, ADMINISTRATOR OF THE ESTATE OF JANET GAY BOWERMAN, DECEASED; GARY R. HUNGATE, ADMINISTRATOR OF THE ESTATE OF MARY S. HUNGATE, DECEASED; MAXINE S. HILL, ADMINISTRATRIX OF THE ESTATE OF JANET MAXINE HILL MIZE, DECEASED; BETTY ROARK, ADMINISTRATRIX OF THE ESTATE OF SHIRLEY L. ROARK, DECEASED ..... *Petitioners*

VS.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs below, pray that a Writ of Certiorari issue to review the April 4, 1977, Per Curiam Opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

On April 16, 1976, the United States District Court for the Western District of Arkansas, Fayetteville Division, entered an Opinion which is reported in *Deal, et al v. United States*, 413 F. Supp. 630 denying all claims of the petitioners. Said Opinion was duly appealed to the United States

Circuit Court for the Eighth Circuit and the Eighth Circuit Court of Appeals in a Per Curiam Opinion reported in 555 F. 2d 255 affirmed the Federal District Court. Printed herein as Appendix "A" is a copy of the Federal District Court Opinion and Appendix "B" is a copy of the Per Curiam Opinion of the Eighth Circuit Court of Appeals.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(1) The date of the judgment sought to be reviewed is April 4, 1977 and same was entered on said date.

(2) The statutory provision conferring on this Court jurisdiction is 28 U.S.C.A. §1254.

QUESTIONS PRESENTED FOR REVIEW

(1) In this case the question presented for review is the "standard of care" and "duty" of an air traffic controller employed by the Federal Aviation Administration. The Eighth Circuit Court of Appeals, in affirming the Lower Court, applied a "duty" of the air traffic controller to only give to the pilot the "assistance requested." All Federal cases considering alleged negligence against air traffic controllers have applied a higher "standard of care" and "duty" on the part of air traffic controllers; therefore, the question presented for review is whether or not the Eighth Circuit Court of Appeals has rendered a decision which is in conflict with the decisions of other courts of appeal on the same matter and whether or not the Eighth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings with reference to a case of this nature.

(2) Whether or not the plaintiffs received a fair trial, due process, and equal protection of the law in view of the manner in which the Federal Judge, as affirmed by the Eighth Circuit Court of Appeals, decided the "duty" of air traffic controllers as related to these plaintiffs.

STATEMENT OF THE CASE

This is an aircraft case wherein the plaintiffs allege negligence on the part of certain air traffic controllers. On March 6, 1971, Dr. Phillip L. Deal and five nurses departed in an aircraft from Fayetteville, Arkansas on an instrument rated flight, controlled out of the Memphis Air Traffic Control Center. The plaintiff-pilot was at all times in communication and under control of air traffic controllers in the MATCC.

The plaintiff-pilot was initially assigned an altitude of 5,000 feet wherein the pilot incurred icing conditions. This initial icing condition occurred during the early stages of the flight and the communications with the Memphis Air Traffic Control Center from the initial reporting of ice continued until the time the aircraft crashed at the Harrison Airport.

During the approximate forty minutes of the flight, the pilot communicated with three different air traffic controllers in Memphis who, during said period of time, had very little activity and other work to do. The pilot's primary communications were with a trainee who was allegedly under the direct supervision of a fully qualified air traffic controller. During the course of the flight it was admitted that the pilot reported, on one change in elevation, that he was "with heavy ice" and although the pilot was

being monitored by two air traffic controllers, both air traffic controllers admitted that they did not hear the communication "with heavy ice." All witnesses testified that when an aircraft was "with heavy ice" that it was in a dangerous and hazardous situation. Also during said flight the pilot was refused a change in elevation because of another aircraft (Lima aircraft) in the area flying in an opposite direction; however, the pilot of said Lima aircraft reported better weather conditions at 8,000 feet and this weather report was not relayed on to Deal as required by the Air Traffic Control Manual.

More specifically, the acts of negligence charged by the plaintiffs as against the Federal Aviation Administration and the air traffic controllers was that the air traffic controllers were negligent in:

(1) Not acting more expeditiously when the pilot initially requested a higher altitude.

(2) In not hearing the communication "with heavy ice."

(3) In not considering the pilot and the five nurses in an emergency situation and providing emergency assistance.

(4) In not realizing that the pilot and the five nurses were in an emergency situation due to the several communications with reference to icing conditions.

(5) In not relaying the Lima pilot report concerning better weather conditions at 8,000 feet.

(6) In that the fully qualified air traffic controller was not actually in direct supervision of the trainee.

(7) In not making interrogation of Deal as would have been required in an emergency situation.

The petitioners have recited the basic facts and the reason that a Writ of Certiorari should be granted is that the Lower Courts did not apply the appropriate "duty" standards to the air traffic controllers.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The Federal District Court had jurisdiction of this case pursuant to 28 U.S.C. §1346(b).

ARGUMENT

The standard of care and "duty" placed upon the air traffic controllers by the Lower Courts in this case was that the air traffic controller was only required to give the assistance to the pilot that the pilot requested. There have been many Federal cases dealing with alleged negligence of air traffic controllers and there is not a single Federal case in existence that supports the "standard of care" and "duty" as placed upon the air traffic controllers in this case.

There were tapes monitoring all communications of air traffic controllers and allegedly all pertinent tapes in this case were preserved by the FAA; however, the FAA did not preserve and keep the tape of air traffic controller Davis, who was allegedly in direct supervision of Sammons, and even without the tape the Federal District Court held that Davis was in direct supervision of Sammons and although they both failed to hear "with heavy ice" the Lower Court held that this "in no way contributed to the accident"; however, the Court in discussing this point at page 638 of the Lower Court Opinion held that the trainee, when he missed the transmission "with heavy ice" did what any:

> ". . . experienced controller manning the radar position would have done exactly as Sammons had done, that is, he *would have given the assistance which a distressed pilot requested.*" (Emphasis added)

In this case a doctor and five nurses were flying in a light aircraft loaded down with heavy ice communicating with an air traffic control center that has well over four hundred air traffic controllers making over $25,000.00 each a year who have at their command millions of dollars of sophisticated air traffic control equipment to assist a distressed pilot, and the Federal District Court held that the

only duty on the air traffic controller is to give the "distressed pilot" what he requested. If such were the law, then why would there be so many air traffic control manuals, procedures, rules, regulations, training schools, and highly paid professional air traffic controllers if their only duty is to give the "distressed pilot" what he has requested.

Another point which should be kept in mind throughout this entire argument, and this point of law is correctly stated by the Lower Court at page 634 of its Opinion, that is, if there is any, even as much as one percent, negligence contributing to the accident on the part of the air traffic controllers, then the five passengers are entitled to full recovery.

In discussing the alleged point of negligence that the air traffic controllers should have interrogated the pilot relative to certain questions specified in the Air Traffic Control Procedures Manual, the Lower Court held that the air traffic controller was not negligent in not interrogating Deal in complying with the Manual and in summing up this particular point, the Lower Court stated at page 637:

> "In other words, Sammons gave Deal the exact assistance which he requested. *No other duty is or should be imposed on controllers.*" (Emphasis added)

The Lower Court has made reference to other standards in its Opinion which still do not meet the standards as established by the many Federal air traffic control cases, such as, the Lower Court stated at page 636:

> "Plaintiffs must show that the controllers either breached one of their duties imposed by the Manual or that the Manual was inadequate to assure safe flight

(citation) and that such negligence was a proximate cause of the accident."

But even this statement isn't true because it does not contain the full statement of the duty of air traffic controllers which includes the duty to use "due care" whether it is prescribed by the Manual or not. However, in reading the Opinion of the Lower Court it can be seen that the Court gave much emphasis to its own established rule of duty because the Court continued to emphasize same, that is, at page 637, the Court again makes the statement, "having found that the controllers satisfied the duty *to give the requested assistance*, . . ." (Emphasis added), which shows that all the Lower Court was looking for, as far as the air traffic controller complying with his "duty" was that the air traffic controllers "gave the pilot all the assistance he asked for."

The Eighth Circuit Court of Appeals in its Per Curiam Opinion stated:

> "Our examination of the record satisfies us that Judge Williams' detailed findings are supported by substantial evidence in that *his decision was not induced by any erroneous view of the applicable law.*" (Emphasis added)

Petitioners will now show by appropriate authority that Judge Williams' decision was induced by an erroneous view of the applicable law.

The detailed facts of the aircraft cases cited will not be discussed other than to say that the cases involve alleged negligence of air traffic controllers.

In *Gill v. United States*, 429 F. 2d 1072 (5th Cir. 1970) the Court stated at page 1076:

> "The specifications of these manuals establish that the government has undertaken not only to provide weather services to pilots but also to suggest as necessary appropriate action to avoid storm areas."

In *Yates v. United States*, 497 F. 2d 878 (10th Cir. 1974) the Court stated at page 883:

> "We cannot, therefore, accept the view that the controllers with the complex equipment which they employ are there merely to give advice. The recognition of these functions as legal obligations gives rise to an attendant duty to perform these functions with reasonable care. * * * As to the failure to warn of the wake turbulence: Once Yates was caught in the traffic sequence which produced his death it is questionable whether any warning as to wake turbulence would have helped, but prior thereto such a warning could have been very significant. Surely the controllers were obligated not only by the Manual to give such warning, but also the traffic condition was fraught with hazard. In relationship to the extent of the hazard the warning would have called for very little effort, and so based on this analysis the trial court was correct in holding that it was negligent to fail to warn."

In *Hartz v. United States*, 387 F. 2d 870 (5th Cir. 1968), the Court stated at page 873:

> "The trial court concluded that no duty existed 'independent of the duty created by the procedures manual.' We disapprove the view that the duty of an FAA controller is circumscribed within the narrow limits of an operations manual and nothing more. We approve the view expressed by the Court of Appeals

for the Second Circuit in *Ingham v. Eastern Air Lines, Inc.*, 373 F. 2d 227 (2nd Cir. 1967), as follows:

> 'While air travel in this jet age has become commonplace, we know too well that there is always lurking the possibility of tragic accidents capable of snuffing out the lives of hundreds in a mere matter of seconds. Much of the success in preventing such disasters can be attributed to the federal government's assumption of the supervision of commercial flying; and public confidence in air travel has been fostered in large measure by knowledge that our government, recognizing the high stakes involved, is constantly overseeing the carrier's operations in order to promote safety. * * * It is now well established that when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently.' "

In *Ingham v. Eastern Air Lines, Inc.*, 373 F. 2d 227 (2nd Cir. 1966), the air traffic controllers were charged with a "duty" which was outside of any manual or written provision. The Federal Government, through the FAA, has taken upon itself the "control" of air traffic and that "control" includes the assistance and the providing for the safety of flights. Any knowledgeable person in the United States could and should feel more secure with reference to aircraft flights because of the control and safety provided by the Federal Government through the FAA. In this case, the pilot and five nurses had a right to rely on the established "duty" of the air traffic controllers and particularly the five nurses had a right to so rely and not think that they were merely relying, one hundred percent, for the safety of the flight after they encountered the heavy icing

conditions, upon the pilot. The five nurses had a right to rely upon the Federal Government's air traffic control system and all of its sophisticated equipment. The Lower Court's denial of the claim in this case is contrary to all other courts of appeal who have ever rendered a decision involving the duty of an air traffic controller.

In *Ingham v. Eastern Air Lines, Inc.*, 373 F. 2d 227 (2nd Cir. 1966), the Court stated at page 236:

> "Moreover, we can give little weight to the government's claim that since its initial decision to provide weather information was a gratuitous one, it could proceed with impunity to violate its own regulations and act in a negligent manner. Dean Prosser has put this doctrine to rest in his treatise: '(T)he good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing.' Prosser, Law of Torts, 333 (3rd Ed. 1964)."

In *Furumizo v. United States*, 245 F. Supp. 981 (USDC D. Hawaii 1965), the Federal District Court stated at page 1002:

> "In light of the foregoing regulations and directives, the Government contends that its controllers did everything that they were required to do, precisely in line with regulations and directives, and hence, could not have been negligent. However, this Court finds that the regulations and directives did not leave the tower controllers devoid of any duty to exercise judgment in the interests of *safety* where, in a situation like this, they knew, or should have known, that a light Piper taking off at the time and in the manner and under the circumstances of this particular case must

almost certainly encounter air turbulence of a degree so severe as to be imminently dangerous to the occupant or occupants of the light plane, which might well include an unskilled student pilot whose life depended upon the exercise of due care by both his instructor pilot and the tower control operator. That these regulations *did contemplate, permit and authorize the exercise of discretion and judgment on the part of tower control operators to lengthen separation if the danger of air turbulence appeared imminent, is proved by the acts and publications of the F.A.A. hereinafter discussed.*"

The Ninth Circuit Court of Appeals in affirming the Lower Court in *Furumizo v. United States* in 381 F. 2d 965 (9th Cir. 1967) stated at page 968 in affirming the Lower Court:

> "As the trial judge points out . . . the regulations of the manual do not make mere automata of the controllers. Their job requires that they act in the interest of safety, and it would be strange indeed if that overriding duty did not include an obligation to seek, by appropriate instructions, to warn a pilot who is starting to take off when it is apparent to them that he would encounter a severe hazard."

The petitioners realize that a Petition for Writ of Certiorari is not the place to argue the facts of a case; however, the petitioners state that they submitted facts which constituted substantial evidence to prove negligence on the part of the air traffic controllers and that such negligence would have been found had the Lower Courts applied the appropriate "standard of care" and "duty" standards to the air traffic controllers in this case.

The petitioners state that the Per Curiam Opinion of the Eighth Circuit Court of Appeals and the Opinion of the lower Federal District Court is in conflict with the aforementioned decisions cited from the Second, Fifth, Ninth, and Tenth Court of Appeals on the same matter; and that the Lower Courts' law as applied in this case so far departed from the accepted and usual course of judicial proceedings with reference to the trial of aircraft cases against the FAA (United States) so as to deny to these plaintiffs a fair trial, due process, equal protection of the law and justice that should have been given to them under *all* of the Federal cases dealing with the duty of air traffic controllers.

CONCLUSION

Petitioners contend, pray, and ask this Court to grant this Writ of Certiorari; reverse the decision of the Eighth Circuit Court of Appeals, in this case, and order and direct that the case be sent back for a new trial under the appropriate "standard of care" and "duty" standards as established by the cases cited bove.

Respectfully submitted,

FOR ALL PETITIONERS

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Appendix "A"

413 FEDERAL SUPPLEMENT

Jo C. DEAL, EXECUTRIX of the Estate of
Philip L. Deal, Deceased ..... *Plaintiff*
vs.
UNITED STATES OF AMERICA ..... *Defendant*
MILDRED C. LETSCH, Administratrix of the Estate of
Donna Colleen Letsch, Deceased ..... *Plaintiff*
vs.
UNITED STATES OF AMERICA ..... *Defendant*
GENE W. BOWERMAN, Administrator of the Estate of
Janet Gay Bowerman, Deceased ..... *Plaintiff*
vs.
UNITED STATES OF AMERICA ..... *Defendant*
GARY R. HUNGATE, Administrator of the Estate of
Mary S. Hungate, Deceased ..... *Plaintiff*
vs.
UNITED STATES OF AMERICA ..... *Defendant*
MAXINE S. HILL, Administratrix of the Estate of
Janet Maxine Hill Mize, Deceased ..... *Plaintiff*
vs.
UNITED STATES OF AMERICA ..... *Defendant*
BETTY ROARK, Administratrix of the Estate of
Shirley L. Roark, Deceased ..... *Plaintiff*
vs.
UNITED STATES OF AMERICA ..... *Defendant*

Nos. F-72-C-42, F-73-C-5, F-73-C-7,
F-73-C-8, F-73-C-11 and F-73-C-38

United States District Court,
W. D. Arkansas,
Fayetteville Division.

April 16, 1976.

Tort actions were brought against federal Government charging negligence on part of air traffic controllers and seeking to recover for deaths of airplane pilot and five passengers. The District Court, Paul X Williams, Chief Judge, held that Arkansas where airplane crash occurred governed substantive rights of parties; that under Arkansas law, representatives of the estates of passengers were entitled to recover even if pilot was negligent, if air traffic controllers were negligent in any degree and if such negligence was proximate cause of crash; and that record established that air traffic controllers were not negligent in not immediately granting pilot's request to change altitude, in not interrogating pilot and in not conveying certain weather report to pilot.

Judgment for defendant.

1. United States — KEY 78(14)

Statute giving district courts exclusive jurisdiction of civil actions against the United States for injury or death caused by negligent or wrongful act of government employee is contrary to traditional conflicts of law rule that law of place of harmful impact governs tort liability. 28 U.S.C.A. §1346(b).

2. Action — KEY 17
Aviation — KEY 234

Court hearing tort actions which arose out of airplane crash in Arkansas and which were based on alleged negligence on part of air traffic controllers located in Tennessee would apply Tennessee conflicts law.

3. Death — KEY 8

Under Tennessee law, law which governs actions for wrongful death is law of place of harmful impact.

4. Aviation — KEY 234

Under Tennessee conflicts law, law of Arkansas where airplane crash occurred governed substantive rights of parties in wrongful death actions charging negligence on part of air traffic controllers located in Tennessee.

5. Negligence — KEY 98

Under Arkansas law in effect in March, 1976, claimant could recover only if his negligence was of less degree than negligence of defendant. Acts Ark. 1961, Act No. 61.

6. United States — KEY 78(8)

Under Arkansas law in effect in March, 1976, a claimant who was without fault could recover for amount of any damage proximately caused by negligence of United States and it made no difference if some other claimant was more negligent than United States.

7. Aviation — KEY 232

Under Arkansas law, even if airplane pilot was negligent, the estate of each deceased airplane passenger was entitled to recover from federal Government if air traffic controllers were negligent in any degree and if such negligence was proximate cause of airplane crash and passengers' deaths. Acts Ark. 1961, Act No. 61.

8. Aviation — KEY 232

For representatives of estates of deceased airplane passengers to recover against federal Government because of negligence on part of air traffic controllers, representatives must show that controllers either breached duty imposed by air traffic control manual promulgated by Federal Aviation Administration or that manual was inadequate to assure safe flight and that such negligence was proximate cause of airplane crash resulting in passengers' deaths.

9. Aviation — KEY 232

Lapse of time between pilot's request for altitude change and air traffic controller's granting of clearance to climb to higher altitude did not constitute negligence on part of air traffic controller, where controller acted as expeditiously as possible in view of the fact that he had to contact another airplane flying in same vicinity before granting request.

10. Aviation — KEY 232

Air traffic controller was not negligent in not requesting airplane which was in same vicinity as airplane accumulating ice to climb until he was sure that pilot of airplane accumulating ice was still requesting higher altitude, where controller could not have known of airplane flying in same vicinity would encounter ice at higher altitude.

11. Aviation — KEY 232

Air traffic controller was not under duty to ask pilot of airplane accumulating ice questions set out in air traffic control manual promulgated by Federal Aviation Administration for questioning of pilot of distressed airplane, where questions concerned location of airplane, number of persons and amount of gasoline on board and controller had pilot's flight plan containing all such information and had actual knowledge of answers to questions.

12. Aviation — KEY 232

Air traffic controllers have only duty of giving exact assistance requested by pilot of distressed airplane.

13. Aviation — KEY 232

Air traffic controller who knew that airplane was accumulating ice did not have duty to suggest that pilot take certain course of action.

14. Aviation — KEY 232

Negligence on part of air traffic controllers could not be predicated on the fact that trainee was manning radar position, where qualified controller was monitoring trainee and trainee acted properly in his treatment of pilot of distressed airplane.

15. Aviation — KEY 232

Airplane which was accumulating ice and which was considerable distance from airplane reporting no ice at 8,000 feet was not an "aircraft concerned"; thus, air traffic controller's failure to relay such report to pilot of airplane receiving ice was not violation of provision of air traffic control manual requiring controllers to relay weather information to other aircraft concerned.

See publication Words and Phrases for other judicial constructions and definitions.

16. Aviation — KEY 232

Air traffic controller exercised due care in deciding that report of no ice was not applicable to airplane which was accumulating heavy ice and which was a considerble distance away at different altitude from airplane that gave report.

17. Aviation — KEY 232

Air traffic controller's failure to relay to pilot of airplane which was accumulating ice report from another

airplane of no ice at altitude it was flying was not breach of common-law duty to use ordinary care where airplane receiving ice was considerable distance from other airplane and only a few minutes from landing.

18. Aviation — KEY 232

Air traffic controller is required to exercise his best judgment.

19. Aviation — KEY 232

Where pilot's communications did not indicate that he considered himself in emergency situation because of airplane's accumulation of ice and airplane was only few minutes from landing area when air traffic controller received information from pilot of another airplane that no ice was present at certain altitude, controller did not breach duty to exercise best judgment in failing to convey weather report to pilot.

20. Negligence — KEY 56(1.7, 1.12)

In Arkansas an act or omission is proximate cause of an occurrence if it is a cause which in a natural and continual sequence produces damages and without which damage would not have occurred.

21. Aviation — KEY 232, 233

Air traffic controller's failure to convey to pilot of airplane which was accumulating ice the report that no ice was being received by another airplane flying at different altitude could not be basis for holding Government liable for deaths of passengers in airplane crash, where there was no evidence that pilot who was nearing landing area would have climbed to higher altitude if he had known of report or would have found clear air if he had changed

altitude in response to report and where there was evidence that crash occurred solely because of pilot error.

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James W. Gallman, Fayetteville, Ark., for Jo Deal.

W. W. Bassett, Jr., Putman, Davis & Bassett, Fayetteville, Ark., for Letsch.

R. H. Mills, Springdale, Ark., for Bowerman.

R. H. Mills, Springdale, Ark., for Hungate.

Stanley W. Ludwig, Springdale, Ark., for Hill.

James Roy, Crouch, Blair, Cypert & Waters, Springdale, Ark., for Roark.

Michael J. Pangia, Trial Attorney, Aviation Unit, Dept. of Justice, Washington, D. C., Sam Hugh Park, Asst. U. S. Atty., Fort Smith, Ark., for the Government.

MEMORANDUM OPINION

PAUL X WILLIAMS, Chief Judge.

These cases arise out of an airplane accident on March 6, 1971 in which six persons were killed.

The Federal Aviation Administration initiated a routine investigation and found no negligence on the part of its agents or the United States.

The legally appointed and qualified representative of the estate of each deceased filed a tort claim with the Federal Aviation Administration. The claims were denied

or became stale and the present actions were filed against the United States. This Court has jurisdiction pursuant to 28 U.S.C. §1346(b).

On March 6, 1976, Dr. Philip L. Deal and five of his employees were tragically killed in an airplane crash at Harrison, Arkansas. The accident was and is one of the saddest imaginable. Not only did a prosperous young doctor with great promise meet an untimely death, but also his wife and their three children were deprived of the love and support which Dr. Deal had so generously provided. Dr. Deal's mother also suffered greatly, her loss being augmented when Mrs. Jo Deal, the widow, and the children moved to Dallas, Texas because there were too many constant reminders of Dr. Deal in the Fayetteville, Arkansas area.

Five young and talented ladies, some no more than children also lost their lives. Mary Hungate was a dental hygienist and Dr. Deal's assistant. She was twenty-seven years old, married to a devoted husband, who was then a student at the University of Arkansas and whom she partially supported. She was the mother of a four-month old baby son and of a three-year old daughter who had a special problem involving her motor control. Mrs. Hungate's death was and continues to be a tragic loss to her husband and children as well as to her parents. The grief on their part has been great and much above normal grief for loss of a loved one.

Janet Bowerman was only seventeen years old and a student at Fayetteville High School. She had always shown initiative in helping her family financially and was an affectionate daughter. She had decided to become a dental hygienist and through her job was gaining invaluable

experience as well as accumulating savings to further her education.

Janet Maxine Mize was twenty-two. She was married and had attended Harding College and State College of Arkansas. Her future contained great promise.

Mrs. Shirley Lucille Roark was a graduate of the Career Academy Dental Assistant School. She was twenty-two and married. Like Maxine Mize, her prospect of a full and happy life ended suddenly.

Donna Colleen Letsch was seventeen and a student at Fayetteville High School. Her graduating class has established a scholarship fund in her memory. Her mother took Donna's death so hard that she required heavy sedation for several years and has still not fully recovered.

The Court finds that as to each of the deceased victims of this tragic accident, the survivors and next of kin have suffered more than the normal grief incident to the death of a loved one; that each deceased person possessed a unique talent for treating patients and had a bright and lucrative future awaiting him or her when life was so sadly and suddenly terminated.

Having described the magnitude of the tragedy as it relates to each of the decedents this Court chooses to approach the legal questions here presented from the point of view of the five passengers in the plane. As will be more fully explained hereafter, under Arkansas law the representatives of the passengers' estates are entitled to recover the full amount of damages they sustained if the United States can be found to have been negligent in any degree, whereas the government has raised the defense of comparative negligence as to claims of Dr. Deal's survivors. The

defense against Dr. Deal's estate is based on the contention that Dr. Deal was apprised of the weather and yet chose to make the flight; knowing his plane did not have de-icing equipment and knowing that he had a paucity of experience in bad weather flying. *See McKee v. Granger*, Civil Aeronautics Board SE—699 (August 15, 1966).

[1, 2] 28 U.S.C. Sec. 1346(b) is in part as follows:

> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or . . . death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.* (Emphasis added.)

This is contrary to the traditional conflicts of law rule that the law of the place of the harmful impact governs tort liability. *See Leflar, American Conflicts Law*, ch. 14 (1968). The discrepancy between the statutory language and the traditional rule was resolved in *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962), when the Supreme Court interpreted 28 U.S.C. §1346(b) to require the forum to apply the entire law of the place of the act or omission including the law governing choice of law. In following the *Richards* "renvoi" approach, this Court must adhere to Tennessee conflicts law, since the plaintiffs allege negligence on the part of air traffic controllers who were at all times pertinent, located at Memphis, Tennessee.

[3, 4] Under Tennessee law, the law which governs actions for wrongful death is the law of the place of harm-

ful impact. *Tune v. Louisville and Nashville Railroad Co.*, 223 F. Supp. 928 (M.D. Tenn. 1963) citing *Parsons v. American Trust & Banking Co.*, 168 Tenn. 49, 73 S.W.2d 698 (1934). Here the accident occurred in Arkansas and therefore, Arkansas law governs the substantive rights of the parties.

[5-7] Under the Arkansas comparative negligence statute in effect at the time of the accident (Acts of 1961, No. 61) a claimant may recover only if the negligence is of less degree than the negligence of the defendant. *Riddell v. Little,* 253 Ark. 686, 488 S.W.2d 34 (1972). If a claimant is without fault, he may recover the full amount of any damages proximately caused by the negligence of the United States and it makes no difference that some other claimant may have been more negligent than the United States. *See Scoville v. Missouri Pacific Railway Co.,* 458 F. 2d 639 (8th Cir. 1972). There is no contention that a passenger was in any way negligent. Therefore, under Arkansas law, the estate of each passenger will be allowed to recover if a controller was negligent in any degree if such negligence was a proximate cause of the accident and death. In other words, even if Dr. Deal is found to have been 99% at fault for the accident and a controller only 1% at fault, the passengers' estates are entitled to recover the full amount of their damages from the United States. The Court will apply these principles to the case at bar, bearing in mind that all that these personal representatives are required to show is the slightest degree of negligence on the part of the controllers which proximately caused the accident.

Dr. Philip L. Deal was an orthodontist who resided in Fayetteville, Arkansas, and maintained offices in both Fayetteville and Harrison. To shorten his frequent trips to

Harrison, Dr. Deal purchased a Beechcraft Bonanza airplane and learned to fly it.

On March 6, 1971, Dr. Deal was scheduled to see patients in Harrison. Though the weather was inclement, Dr. Deal arranged to meet his dental assistants, nurses and receptionists at Drake Air Field in Fayetteville. When Dr. Deal first arrived at the Airport and called about the weather he received the information which had been gathered at 7:00 a.m. Though the weather report permitted a noninstrument flight, Doctor Deal filed an instrument flight plan, but decided to wait until he receivedd the 8 o'clock weather report.

The 8:00 report reflected a low degree of visibility, but still above the minimum required for visual flying. It also reported a cold front in the area and some precipitation. At 8:08 (1408:50 Greenwich Meridian Time) Dr. Deal obtained clearance from the Memphis Air Traffic Control Center to make an instrument flight from Drake Field in Fayetteville to the Boone County Airport at Harrison, Arkansas. The five assistants accompanied him.

The Federal Aviation Administration control system is a large and sophisticated system and getting larger and more sophisticated all the time. However, in this case, the Air Controllers at the Memphis, Tennessee Control Center had no actual visual or radar surveillance of the flight of the Deal plane from Fayetteville to Harrison, Arkansas. Its only contact was by radio. There is no contention that any act done or word spoken by a controller in Memphis was incorrect.

In order to more fully understand the manner in which the Federal Aviation Administration services the area between Harrison and Fayetteville and particularly, how it

was afforded on the day of the accident, we must explain some aspects of the existing air traffic control.

The lower altitude airspace in the Fayetteville-Harrison vicinity is known to air traffic controllers as the "Fayetteville Low" area. The nearest air traffic control center and the control center to which pilots in the Fayetteville Low area communicate is situated at Memphis, Tennessee. Within the control center at Memphis, each controller is assigned to work a specific geographical area, either as a radar or manual controller. A controller in a manual position keeps up with the location of aircraft in the area by radio contact with the pilots and flight plans which they have filed, whereas a controller manning the radar position is also qualified to locate aircraft through radar equipment. The controller who coordinates activity between the radar and manual operators is known as a Coordinator.

On the day of the accident Thomas Sammons held the manual position, Finney was on radar and the coordinator was Edmond F. Davis. The following communications between Deal and the Memphis control center are relevant to a discussion of the issues of this case. At 1408:52 Deal reported that he was headed north and leaving Drake Field, Fayetteville, Arkansas. At 1412:55 Deal reported that he was level at 5000.

At 1417:20 Deal reported that he was at 5000 feet and stated "we have some light rime ice, we would like to change to seven thousand." When Deal requested the change in altitude to seven thousand feet, Sammons was conferring with the Springdale flight service station and continued the interphone conversation, which began at 1416:26 and ended at 1417:37.

At 1417 Sammons, from the radar position, advised Deal that he was unable to give the requested altitude change to seven thousand because he had traffic westbound at six thousand and advised Deal that he could give him a lower altitude, which Deal accepted at 1417:53 and Deal descended to four thousand feet. At 1418:16 Sammons requested that Harrison Flight Service Station contact the westbound plane, hereafter called the Lima aircraft, and have the Lima aircraft contact the Memphis Air Traffic Control Center. This was accomplished by the Harrison Flight Service Station, and at 1418:52 Lima contacted the Memphis Air Traffic Control Center and reported that he was at six thousand. Sammons made radar contact of the Lima aircraft through Harrison at 1419:28. Sammons made inquiry of Deal at 1421:22 to see if Deal was losing any of his ice, to which Deal responded in the negative at 1421:28. Sammons asked Deal at 1421:33 if he was requesting a higher altitude to which Deal responded emphatically in the affirmative at 1421:36. At 1421:43 Sammons directed the Lima aircraft to climb and maintain eight thousand and advised Deal at 1421:55 that he could climb and maintain six thousand, whereupon, Deal responded at 1422:00 that he was "out of four for six." At 1425:05 Deal advised Sammons that he was "out of five for seven, with heavy ice."

At 1428:39 Deal advised Sammons that he was coming up on six thousand, still getting the ice, but thought that the ice was beginning to break up a little. At 1428:45 Sammons made inquiry of Lima about his icing condition, to which Lima responded at 1428:49 "yeah, I'm ok at eight, uh, we're not picking up anymore."

At 1429:38 Deal advised Sammons that he was "no better on ice at six thousand, so we'll come on back down if you'll let us" to which Sammons responded at 1429:45:

> "Seven seven zero eight Romeo, roger, and I'm painting a primary target, uh lost it that sweep, but, uh, about twelve miles southwest of Harrison, and, uh, you're cleared for an approach to the Harrison Airport, leaving four thousand."

At 1430:04 Deal advised Sammons that he was "out of six for four."

Deal then proceeded to the Boone County Airport, contacted the Harrison Flight Service Station, and made his approach to the Harrison Airport in accordance with the procedure as outlined in the approach plate for the Boone County airport.

Deal failed to make the final approach properly and instead of going around again, elected to make a sharper turn than was usual. In doing this, he lowered the left wing so sharply it caused the plane to stall and crash. All aboard were killed.

The Plaintiffs contend that the Air Traffic Controllers were negligent in the following respects:

(1) in not acting more expeditiously at 1417:20 in giving Deal a higher altitude;

(2) in not hearing the transmission "with heavy ice" at 1425:05;

(3) in not considering Deal in an emergency situation and providing emergency assistance;

(4) in not realizing that Deal was in an emergency situation due to the several communications with reference to icing conditions;

(5) in not relaying the Lima pilot's report received at 1428:49 that Lima was not picking up any more ice at eight thousand feet;

(6) in that Davis was not actually in direct supervision of Sammons, a mere trainee in control of the Deal Flight and the radar assistance; and

(7) in not making interrogation of Deal as would have been required in an emergency situation.

[8] In considering the various allegations of negligence, the Court notes that the duties and responsibilities of the controllers in respect to services to controlled aircraft are set out in the Enroute Air Traffic Control Manual promulgated by the Federal Aviation Administration. Plaintiffs must show that the controllers either breached one of their duties imposed by the manual or that the manual was inadequate to assure safe flight (*White v. Trans World Airlines, Inc.* 320 F. Supp. 655 (S.D.N.Y. 1970)) and that such negligence was a proximate cause of the crash.

The primary duty imposed on air traffic controllers is to avoid collision. A.T.C. Manual, paragraph 25 p. 15 (1970). A controller may not give clearance for an aircraft to change its position when to do so would violate the separation standards imposed by the manual, although a pilot who deems himself in an emergency escapes penalty for violating the provisions of the Federal Aviation Regulations which prohibit a pilot from flying except at the altitude

and on the course which the controllers have been notified he will follow. 14 C.F.R. Sec. 91.3(b). The Court finds that at 1417:20 Deal requested clearance to seven thousand feet. Twenty-four seconds later Sammons told Deal that there was a westbound plane in the vicinity flying at six thousand feet and therefore Deal could not immediately climb. Sammons voluntarily informed Deal that Deal could be granted clearance to a lower altitude. Immediately after speaking with Deal, Sammons attempted to get in contact with the westbound plane. The only method to accomplish this was to go through the Harrison Flight Service which Sammons did. Sammons, then, as expeditiously as reasonably possible contacted Deal again to see if he still wanted a higher altitude and Deal responded that he wished to climb. Again acting as expeditiously as reasonably possible, Sammons notified the westbound plane and granted Deal clearance for a higher altitude.

[9] The Court finds there was no negligence on the part of Sammons in not granting Deal clearance to a higher altitude any sooner. Sammons acted as quickly as he reasonably could. Even if there had been more than one controller attempting to accomplish the clearance, the contact with the westbound plane could not have occurred more quickly and Deal could not have been told of the clearance sooner.

[10] Neither was Sammons negligent in not requesting the westbound plane to climb when he first initiated contact. There is no way of predicting whether a plane will encounter ice at a certain altitude. Because Sammons could not have known if the Lima plane would find icing conditions at a higher altitude, he exercised reasonable prudence

in not ordering the Lima plane to climb until he was sure that Deal was still requesting a higher altitude.

Next the plaintiffs allege that the controllers were negligent in not hearing Deal's 1425:05 transmission in which he said that he was leaving five thousand feet "with heavy ice." As will become apparent this contention can only lead to liability if it is read in conjunction with the contentions concerning emergency situations. The plaintiffs contend that the controllers are charged with having heard the transmission, being estopped from denying that they heard the transmission because Sammons responded "Roger", a response which indicated receipt of the transmission. They allege that heavy icing conditions are treated as an emergency situation by the controllers and that if the air traffic controllers treated Deal as being in an emergency, the controllers would have somehow been of greater assistance to him. The problem with plaintiffs argument is glaringly apparent: neither they nor the Court can speculate on what the controllers could possibly have done if they had known an emergency existed, that they did not in fact do.

The plaintiffs contend that if an emergency exists or if there is a situation which the controllers should treat as an emergency, the controllers have a duty to ask the pilot of the distressed plane certain questions set out in the manual. A.T.C. manual paragraph 665, p. 129. The plaintiffs contend that failure to ask the enumerated questions constituted a breach of duty which was a proximate cause of the accident.

[11] The Court finds that there was no duty on the part of Sammons to ask the questions. The questions concerned the location of the plane, the number of persons and

the amount of gasoline on board. Deal had filed his instrument flight plan with the air traffic control in Memphis. His flight plan contained all of the information which Deal would have given Sammons, had Sammons initiated the questioning of Deal. In addition, Sammons testified that he had actual knowledge of Deal's location, the number of persons and the amount of gasoline on board. Sammons also testified that there was nothing he could do had he initiated the questioning and received the response.

[12] In emergency situations, controllers are to give the distressed planes priority to the extent consistent with the rules governing separation of aircraft and to give the pilot any assistance which he requests. A.T.C. manual paragraph 665, p. 129. Here Sammons gave Deal clearance as expeditiously as possible. In other words, Sammons gave Deal the exact assistance which he requested. No other duty is or should be imposed on controllers.

[13] Even in an emergency situation, an air traffic controller having only the information possessed by the controller in this case, has no duty to suggest that the distressed pilot take a certain course of action.

> The final decision either to attempt a landing or divert to another airport was in the hands of the pilot. This is quite properly so since he is in the best position to observe and judge the actual effect of the weather on the plane's landing approach. *Ingham v. Eastern Airlines, Inc.*, 373 F. 2d 227, 237 (2nd Cir. 1967).

Having found that the controller satisfied the duty to give the requested assistance, the Court notes that the failure of Sammons to ask the enumerated questions in no way contributed to the tragic accident.

Plaintiffs' claim against the United States is based on a theory that "if" a controller had done something which he had no duty to do and "if" Dr. Deal as a pilot had seen fit to follow the "if" action, then speculatively he would have piloted his plane in some other way and maybe to some other place and maybe there would have been no accident. We find this theory too conjectural and speculative to be considered as a part of a proximate cause.

The plaintiffs also allege that the controllers were negligent because Sammons was manning the radar position for the Fayetteville low area when he was not qualified to do so. The rules governing the activities of controllers provide that a trainee may operate a radar position, but his communications and actions must be monitored by one who is qualified. The plaintiffs have proved that at 1414 GMT, Finney went to coffee and Davis signed in as being in charge of the radar position, though Sammons actually communicated to Deal from the radar position. Davis and Sammons both failed to hear Deal's 1425:05 transmission in which he stated that he was accumulating heavy ice.

[14] The Court finds that Davis was monitoring Sammons, even though the tape which recorded what Davis heard at the time pertinent, has been destroyed. The Court must also note that even if Davis had not been monitoring Sammons, the omission was not a proximate cause of the accident. As has been previously explained, the failure to hear "with heavy ice" in no way contributed to the accident. It is clear that even though Sammons was a mere trainee for the purpose of reading radar, he did not err in his treatment of Deal. Any qualified, experienced controller manning the radar position would have done exactly as

Sammons had done, that is, he would have given the assistance which a distressed pilot requested.

Plaintiffs' last contention concerns the controllers' failure to relay to Deal that the westbound plane had reported that it was not picking up ice at an altitude of eight thousand feet. The Court finds that the controllers had no absolute duty to provide this information to Deal and in this case its failure to do so was neither negligence nor a proximate cause of the accident.

Paragraph 42, p. 18 of the Manual provides:

> You may relay any elements of weather information as received in a PEREP (pilot weather report) to other ATC facilities or aircraft without consulting the weather reporting station.
>
> b) Relay pilot reported significant weather information to other aircraft concerned and to the appropriate center FSS (Flight Service Station) . . . as appropriate.

[15] The Court finds that Sammons had no duty to relay Lima's report to Deal because Deal was not at the time an "aircraft concerned." When the Lima plane reported it was no longer picking up ice at eight thousand feet, it was some considerable distance to the west of Deal's plane. Since icing conditions occur in pockets and at different altitudes throughout a cold front, there was nothing to indicate that Deal would or would not find it clear at eight thousand feet. This factor distinguishes the case at bar from *Ingham v. Eastern Airlines, Inc.*, 373 F. 2d 227 (1967) in which liability was imposed for the controllers' failure to relay significant weather changes at the airport at which the plane was to land. In *Ingham,* there was no

question but that the plane would incur the worsened weather conditions and also the air traffic controller had personal knowledge of the worsened weather conditions. The evidence concerning icing conditions leads us to the conclusion that there was no positive assurance that Deal would have found clear weather at eight thousand feet.

[16] The Court also notes that the air controllers in Memphis did not have radar equipment which would monitor the lower altitudes in the Fayetteville Low area. The controllers had no means of determining the weather in Deal's vicinity except what had been communicated to them by persons in the area. There are no allegations that the controller failed to report any significant weather information to Deal, except the information which the controller had gleaned from the Lima plane. The Court finds that Sammons was exercising due care in deciding that the Lima report would be inapplicable to Deal who was a considerable distance away.

[17] Neither was Sammon's failure to relay the Lima's report a breach of the common law duty to use ordinary care. Deal was only a few minutes from Harrison. The cold front was moving into the area, and apparently the icing problem would only get worse as the morning progressed. In light of these factors, Sammons had no duty to relay the weather report from the Lima plane as there was nothing to indicate that Deal was in a position similar to the Lima plane.

[18, 19] A controller is also required to exercise his best judgment. Given the fact that Deal's communications did not indicate that he considered himself in an emergency situation and the fact that Deal was only a few miles from

Harrison when Sammons received the Lima weather report, we find that Sammons did not breach the duty to exercise his best judgment in failing to convey the Lima report to Deal.

[20] The plaintiffs have also failed to establish by a preponderance of the evidence that the failure to report the weather information was a proximate cause of the accident. In Arkansas an act or omission is a proximate cause of an occurrence if it is a cause which in a natural and continual sequence produces damage and without which the damages would not have occurred. *Hartsock v. Forsgren, Inc.*, 236 Ark. 167, 365 S.W. 2d 117 (1963).

[21] This Court would have to engage in speculation and conjecture to find that Sammons' failure to relay the Lima weather report in any way contributed to the accident. There is no proof that Deal would have climbed to eight thousand feet if he had known Lima's report; and his proximity to Harrison indicates otherwise. There is no proof that Deal would have found clear air if he had climbed to the higher altitude. There is no proof that Deal would have accumulated less ice if he had climbed. The Court mentions this because, to land at Harrison, which Deal, as a pilot elected to do, Deal would still have to descend through the strata which had contained ice. Though there is evidence that the accumulated ice affected the plane's aeronautical traits, there is also credible evidence that the crash occurred solely because Dr. Deal miscalculated the approach onto the Harrison runway and banked too sharply, when he could have gone around again and made a proper approach. We note that no action of any air controller caused the ice condition and there is no contention

to that effect. Ice on the wings of a plane probably requires more skill on the part of a pilot in order to pilot and land the plane, but ice is a weather condition, and in this case better known to the pilot than to anyone else.

It would be error for this Court to engage in the speculation and conjecture necessary to establish that Sammons' good faith exercise of his best judgment was a proximate cause of a passenger's death.

The Court finds that the plaintiffs have been unable to meet the burden of proving any negligence of an air controller which was a proximate cause of the tragedy.

Having found no actionable negligence on the part of the air traffic controllers, the Court finds that all of the claims including the Deal claim, against the United States should be dismissed. The Clerk will prepare an Order in accord with this opinion.

Appendix "B"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1592

Jo C. Deal, et al, Appellants v. United States of America, Appellee	Appeal from the United States District Court for the Western District of Arkansas.

Submitted: March 15, 1977

Filed: April 4, 1977

Before VAN OOSTERHOUT, Senior Circuit Judge, BRIGHT and ROSS, Circuit Judges.

PER CURIAM.

Dr. Deal and five passengers, travelling in a private plane piloted by Dr. Deal from Fayetteville to Harrison, Arkansas, were all killed in a tragic accident while attempting to land at the Harrison airport. Their executors brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. §1346(b), asserting the accident was proximately caused by the negligence of federal air traffic controllers.

The district court (Judge Paul X Williams) dismissed all complaints on the basis that the Federal officials were

guilty of no negligence which proximately caused the accident. The basis for such determination is clearly set out in a well-reasoned opinion of the trial court reported at 413 F. Supp. 630 (W.D. Ark.).

Our examination of the record satisfies us that Judge Williams' detailed findings are supported by substantial evidence and that his decision was not induced by any erroneous view of the applicable law. We affirm on the basis of Judge Williams' reported opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.